

Balanced Copyright Would Be Nice

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Introduction

Copyright law attempts to protect the expression of ideas. New Zealand law, like much of our law, is based on English copyright law, which began with the monarchs granting a monopoly to the seventeenth century Stationers Company to print, publish and sell books, in return for agreement to enforce censorship of heretical literature.¹ In New Zealand we have a statutory code which exclusively governs this area of the law, called the Copyright Act 1994. However, copyright does not exist in a vacuum. It is part of society and of a wider body of intellectual property law, which has the common aim of broadly protecting products of the human mind. Copyright therefore exists in a spectrum of regulation which also takes in other property rights such as trade marks, patents, design law, the common law relating to passing off and breach of confidence, and consumer law such as that covered by the Fair Trading Act 1986.

However, while copyright exists in this national context, it also exists in an international setting. Because it regulates a form of property, copyright has the potential to affect how New Zealand takes part in international trade. It has even been said that intellectual property is to a large extent *about* international trade.² New Zealand, as a small, isolated island nation, is dependent on trade. Therefore it is a signatory to TRIPS – the Agreement on Trade-Related Aspects of Intellectual Property Rights of 1994, intended to ensure that intellectual property rights do not become barriers to international trade. We have also signed the Berne Convention for the Protection of Literary and Artistic Works originally signed in Switzerland as early as 1886, which established a reciprocal system for the recognition of copyright. Also relevant is WIPO, the World Intellectual Property Organisation, originating in the United Nations, which has developed two copyright treaties with a focus on reforming copyright law to cope with the technological challenges presented by the internet and digitisation.

The challenges presented to the law by the growth of technology are not new, nor are they unique to copyright law. In media law, social order and state censorship have been tested from the earliest times, by the development of the printing press, of celluloid film which was used first for still photography and then to project moving images, of the television, of video recording and display technology, and now the internet generally and digital broadcast. In suppression and contempt law, courts are daily being challenged as to how to deal with discussion and reporting of court cases in the media and online, to ensure that rights to fair trial are preserved, as well as the interests we all have in the proper administration of justice and in freedom of expression.

Balancing

In all of these scenarios, the law is required to carry out a balancing process which derives from the liberal imperative for regulating any human activity, whether public or private. This is Mills' harm principal – that a liberal state should allow the individual to engage in any activity, so long as it does not cause harm to others. Our lawmakers decide, through us, what activities cause harm and attempt to develop laws which facilitate human activities while mediating any resulting harms. Usually this is done by balancing, and usually, when disputes arise and cannot be resolved, a court has to exercise this balancing function.

¹ Anna Kingsbury, 'Intellectual Property, Student Companion', (LexisNexis Butterworths, 2002), 1.

² Paul Sumpter, 'Intellectual Property Law: Principles in Practice', (CCH, 2006), viii.

Copyright is no different. It is well recognised in copyright law that the two main goals of regulating this private area of the law are to promote ‘the public interest in the encouragement and dissemination of artistic and intellectual works, and justly [reward] the creator of the work. ...Since these purposes are often in opposition to each other, courts should ‘strive to maintain an appropriate balance between these two goals.’”³ It is a truism, then, that ‘balanced copyright would be nice’, since that is what it is all about in any event.

The place of economic theory

Nat Torkington’s paper addresses a number of issues in copyright law for New Zealand, and exploits a largely economic analysis to conclude generally that a wholesale review of copyright law is needed and that such review should focus more on the interests of consumers. I certainly agree that we are getting to a point in copyright where there is a disjunct between the expectations of consumers and producers which appears to justify further review, even though we have only recently completed a review exercise. I would note, however, that I do not see this disjunct as existing simply between consumers and producers. In large part, producers of copyright material licence or dispose of their interests to distributors, and it is the latter group who have been fighting many of the cases arising from use of new technology. And they have been fighting these cases for economic reasons – to maximise profits and preserve market position. The maximising of those profits must also contribute to annual revenue in any economy and provide for economic growth and jobs, arguments Nat has made for expanding the fair use provisions in our copyright law. This suggests arguments about opening up copyright law are more complex than simply suggesting that creators and distributors should be forced to give up rights so consumers can have more access.

Public interest

This is why I would prefer any review to be focussed on creating a better balance between the public, rather than the commercial/consumer, interests involved. The juxtaposition of economic interests takes no account of the broader social context in which law exists. Law concerns itself not only with utopian theory about human behaviour as forms of individual self-maximisation, and human beings as rational actors in the market intent only on consumption. The concept of the public interest is well developed in media law, for example. In cases involving the media wanting to publish more, such as privacy, defamation, and suppression of aspects of court reporting, the law has to weigh the public interest in freedom of expression against varied public interests which are often connected to human autonomy and dignity. The media’s commercial interests in getting and making money out of ‘a good story’ are recognised as a background to the analysis, but are not determinative. What is being done here is that individual self-maximising behaviour is interpreted using a public harm standard, and the various harms are weighed. Where there *is* public harm, and it outweighs the other harms involved, then the law is justified in intervening to enforce a right of some kind. I am suggesting this would be a more useful way of looking at the claims involved in reforming copyright law. It would explain, for example, why special recognition of Māori traditional intellectual property is a good idea. I note that the need to make copyright material more accessible to consumers as a theme of Nat’s paper is inconsistent with his suggestion of the separation recognition of indigenous rights. Such a regime, could, after all, make more information less accessible than it is now. This could be supported on public interest grounds, however.

Copyright term

Public interest might also better support arguments to reduce copyright term, and would assist a determination of what is reasonable. Reconciling the two aims of copyright of encouraging

³ Abella J in *Robertson v Thomson* [2006] SCC 43 [69].

dissemination and rewarding creators is required here. Certainly evidence about diminishing returns can be taken into account, for there will be a correlative reduction in the public interest involved. And an argument can be made that patent law, with its much shorter term of 20 years, has not discouraged pharmaceutical companies from investing huge sums in the industry. But should the terms protected be the same? The fact remains that the forms of public interest involved are not the same. Patent law requires full disclosure of the invention to the public in return for the protection, whereas copyright protects the expression of the idea, not the idea itself.

Furthermore, many creators look to provide for themselves into retirement out of their creative efforts, and there is public interest in that which should be weighed. Authors should be encouraged to attempt to write a classic work, one that remains a bestseller. Nat uses economic theory to argue that there is diminishing marginal return for consumers on copyright term. There may be some truth to that currently. But it ignores the major changes that are in fact put forward to support changes to copyright law. For example, the Google Book settlement, discussed further below, illustrates that publishing is being turned inside out. In the near future, books may never go out of print. Nat's consumers will be able to access whatever their tastes lead them to using search engines. How books will become bestsellers or even whether the notion of the bestseller will survive, we have no way of knowing. Books might just become 'stayers', generating steady income for a very long time. Or perhaps works will simply become 'wakers,' with new life breathed into them in regular cycles. So the future of the exploitation of creative works is largely unknown. In any event, the possibility of currently creating a bestseller operates as an incentive in itself. So it is at least arguable that the minimum period of copyright should be set at the period of the life of the creator.

Parody and satire

Similarly, weighing public interests supports the protection of parody and satire as fair use in copyright law. Satire and parody are well-protected, for example, in defamation and censorship law. These categories of speech are of high value in terms of public interest, as they contribute powerfully to the proper functioning of an effective democracy.⁴ Probably also our developing Bill of Rights jurisprudence would support their protection in this area of the law.

The Google Book Settlement

There is much that we still do not know about the Google plan to scan and make available millions of books that are out of print but still in copyright, including 'orphan works' whose authors are unknown. Several years ago, Google began this project to create a searchable archive, engaging the support of libraries such as the Bodleian in Oxford, which saw the enormous benefits of making a digital library so accessible. That is, after all, what libraries are about. By using the internet, readers will be able to get access to published content which has never been available before. Around this database, Google intends to create web-pages to sell advertising and to collect user information which will be sold commercially.

However, following a copyright suit, Google was forced to reach a settlement with the Authors Guild and the Association of American Publishers, under which it could continue unless an American copyright holder expressly asked it not to scan a relevant book. Google also promised to pay sums to authors and publishers whose books it had already scanned, and agreed that a registry would be set up to allow authors and publishers to receive over 60% of the income from the project. A coalition of non-profit groups, individuals and library associations, also joined by on-line Google rivals Amazon, Microsoft and Yahoo, known as the Open Book Alliance, then

⁴ And have for some time. See eg: *Massey v N.Z. Times* (1911) 30 NZLR 929.

filed a suit, and objections to the settlement now number over 400. Objectors include the American society of Journalists and Authors, the Electronic Frontier Foundation, the Internet Archive, the Science Fiction and Fantasy Writers of America, and the German and French governments. The US Justice Department has also launched an anti-trust investigation. The matter was due to be resolved in early October, but Judge Denny Chin sent the parties away for further negotiations until 9 November. The main concerns which have been raised about the Google project and the settlement are:

- How can Google ‘invert’ copyright and indeed, ordinary contract law, by forcing parties to opt out rather than opt in?
- Is Google being allowed to write its own copyright law with the settlement?
- Will Google obtain a monopoly on copyrighted books by becoming the sole gatekeeper to a huge body of knowledge?
- Why should Google get these rights to orphan works?
- Will the settlement limit authors’ dealing rights?
- Will the settlement have effects on overseas authors?
- Will the privacy of users be protected?

Added to these concerns is a simple question of whether Google is up to the job. It has been repeatedly noted that Google Book Search appears to be a repository of lies. For example, it has listed 182 results showing Charles Dickens as the author of books published before he was born and at least one edition of ‘A Christmas Carol’ was dated 1135, three centuries before the printing press was introduced to Europe. Apparently Sigmund Freud is one of the authors of ‘The Mosaic Navigator: the essential guide to the Internet Interface,’ and Barack Obama also published 29 books before he was born.⁵ It seems that in collecting every data entry to compile the list of every book published in America since 1923 (and still under copyright), Google also collected every data entry error as well. One author found an ever growing error-laden list for his own works, as well as a listing for a 1924 Master’s thesis by his great-aunt which had been taken from a library database with no evidence that it had ever been published or that she had registered copyright.⁶ If the scholarly value of the archive is in doubt, the public interest in the archive is reduced.

Although it is New Zealand copyright law that should apply to the work of New Zealand authors, the Google settlement has caused some consternation among New Zealand authors, mainly because of the uncertainties around it, and the expansive nature of Google’s behaviour.⁷ Reform of New Zealand copyright law will not change the commercial behaviour of enormous online businesses which are located overseas. The issue does illustrate, however, that concerns about copyright law are not only national, but global.

Termination penalties

The question of the liability of third parties for infringement of copyright has been brought sharply into focus in relation to the internet and the effects of proposed reforms contained in the Copyright (New Technologies) Amendment Act 2008. This Act largely came into force on 31 October 2008, but the implementation of s 92A, which would have required ISPs to have an account termination policy in appropriate circumstances for repeat copyright infringers, was

⁵ Matthew Reisz, *Times Higher Education* 10 September 2009.

⁶ Jeff Hecht, *New Scientist* 3 October 2009.

⁷ See eg: ‘Google Steals NZ Taonga and Rips off Law Commissioners’, Dr Lynley Hood, *Scoop*, 18 August 2009.

delayed twice before an indefinite delay in March 2009.⁸ The provision faced strong opposition from ISPs and internet user groups, and was described variously as a 'toxic regime' and as being based on 'guilt by accusation'. Arguments such as those made by Nat in his paper, that termination of access is out of proportion to the alleged offence, and that compliance costs for ISPs are unacceptable, were also strongly advanced. A powerful and very effective public campaign opposing the provision was launched, including an internet blackout by bloggers and support groups.

The government has international obligations to meet in this area and the Ministry of Economic Development has since issued a Consultation Paper containing further proposals to deal with the issue.⁹ The paper proposes a three phase procedure providing an alternative course of action in which disputes are managed by the Copyright Tribunal. In particular, the Tribunal would make decisions to terminate internet accounts. Groups such as InternetNZ remain opposed to termination penalties, but the proposals have, unsurprisingly, been welcomed by rightsholder groups such as NZFACT (the NZ Federation against Copyright Theft).

The outcome of this dispute must, in any sense, be a form of compromise. It is interesting that the US, bastion of the free market and freedom of expression, has an exclusive copyright regime which obliges ISPs to take down material when they are notified of copyright infringement.¹⁰ However, there are alternatives. Canada has exemption from liability for ISPs when acting as intermediaries with no obligation to take down anything.¹¹ However, ISPs also apply a form of voluntary self-regulation which is a 'notice and notice' system. The Canadian Association of Internet Providers, the Canadian Cable Television Association and the Canadian Recording Industry Association have agreed to cooperate with complainants to send a notice to a user when notified by a rightsholder of an alleged infringement. The conflict is then confined to the parties, who bear the costs of any legal proceedings. Although attempts have been made to put this process into legislation in Canada,¹² the voluntary regime persists. It preserves freedom of expression and is relative cost effective, although, like any system, can be misused and avoided. Notice and notice procedures have been supported by InternetNZ.¹³

Codes of practice are a good idea, if there can be real agreement around the content and real adherence to the ethical guidelines and processes contained within them. Self-regulatory codes developed by internet industry associations exist in the UK, Canada and Australia primarily aimed at regulating the availability of criminal content. Such codes can support effective notice and notice regimes, and also give lustre to the industry, which is seen as responsible and professional. Codes also stave off heavy-handed government regulation.

Conclusion

It is stating the obvious to observe that these are complex issues to which there are no easy answers. But it is too easy to suggest simply that the law should be reviewed. The law has just been reviewed, and, in relation to s 92A, is still being reviewed. The government is in the difficult position of wanting to create workable and effective law for its nationals, whilst also meeting its international obligations, against a background of profound and rapid technological

⁸ S 92C of the Act provides a form of immunity for those who store infringing content which is lost if an ISP knows or has reason to believe that the material infringes copyright and does not delete the material or prevent access to it as soon as possible after becoming aware.

⁹ MED, 'Section 92A Review Policy Proposal Document for Consultation' July 2009. See <http://www.med.govt.nz/upload/68683/proposal-document.pdf>

¹⁰ The Digital Millennium Copyright Act 1998.

¹¹ Copyright Act 1985.

¹² See Copyright Bills C-61 and C-60 2005.

¹³ 'InternetNZ calls for "Notice and Notice" System to replace s 92A', <http://blog.internetnz/?p=281>

change. In my experience, governments generally do try to carry out effective review, based on some form of consultation. It is important that industry does not just take part in these processes in a reactive way, but engages at an early stage so that the process is fully informed. I certainly believe that some areas of copyright law need review, but what is becoming ever-clearer is that no jurisdiction can any longer reform its copyright laws with full effect without some sort of 'grand' review. These issues are now global and many of the solutions will have to be global as well.